IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 18

JIM SKIDMORE, ET AL., *Petitioners*

v.

SWIFT & COMPANY, *Respondent*

BRIEF FOR PETITIONERS

CURTIS McBROOM,
MARK McGEE,
1404 Commercial Standard Bldg.
Fort Worth Texas.
Attorneys for Petitioners,
JIM SKIDMORE, ET AL.

Of Counsel
NORTON I. KATZ,
31 Nassau Street,
New York, N. Y.
TOMMY FORBIS,
JACK LOVE,
Burk Burnett Bldg.,
Fort Worth, Texas.

Commercial Recorder Fort Worth Texas 2-5398

SUBJECT INDEX

	Pages
OPINION BELOW	1
STATEMENT OF GROUNDS FOR JURISDICTION	1
STATEMENT OF THE CASE	2
SPECIFICATION OF ERRORS	5
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. The time which petitioners were required to stay in the respondent's tire hall constitutes "working time" within the meaning of the Act, regardless of the fact that petitioners were permitted to recreate themselves and sleep during the time they were not actually answering alarms	9
II. The opinions of the District and Circuit Courts rendered in this cause are not supported by the weight of authority	14
III. Inasmuch as it is undisputed that petitioners were employed by respondent for daylight service, and that this service was extended into the night by reason of which petitioners were employed for a workweek beyond the maximum hours provided by Section 7 (a) of the Act, petitioners are entitled to overtime pay calculated at one and one-half times the regular rate of pay which they received for the forty-four and later forty hours daylight work	19
SUMMARY AND CONCLUSION	24

TABLE OF CASES

	Pages
Bountiful Brick Company v. Giles, 276, U. S. 154	8,13
Carlton v. London Mines & Milling Company (Colorado District Court, Second Judicial District) 4 labor cases, 60699	14,15
Cordell v. H. F. Wilcox Oil & Gas Co. (U. S. District Ct., E. D., N. Y.) 5 labor cases, Sec. 60807	14,15
Fleming v. Rex, 43 Fed. Sup. 950	8,12,14
Johnson v. Dierks Lumber Co., 130 Fed. (2d) 115	8
M. K. & T. Ry. v. United States, 231 U. S., 112	8,13
Muldowney v. Seaburg Elevator Co., Inc., (U. S. Dist. Ct., E. D., N. Y.), 4 labor cases, 60517	14,15
Mumpus v. Continental Baking Co., 124 Fed. (2d) 548	23
Murray v. Noblesville Milling Company (7 Cir) 131 Federal (2d) 470 (l. c. 472)	10
Overnight Motor Transportation Co. v. Missel, 86 Law Ed. 1159 (U. S. S. C. July 8, 1942)	19,20,22,24
Sklar Oil Corp. v. Thompson, 126 Fed. (2d) 872	12,22
Sunshine Mining Company v. Carver, 41 Fed. Sup. 560	12
Travis v. Ray, 41 Fed. Sup. 6	8,12
Walling v. Belo Corp., 86 Law Ed. 1166 (U. S. S. C. July 8, 1942)	19,20,22,23
Walling v. Sun Publishing Co., 47 Fed. Sup. 180	13
Wantock v. Armour & Co., 140 Fed. (2d) 356	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 18

JIM SKIDMORE, ET AL., *Petitioners*

v.

SWIFT & COMPANY, *Respondent*

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, Fort Worth Division is reported in 53 Fed. Supp. 1020 (R. 26). The opinion of the United Circuit Court of Appeals for the Fifth Circuit is reported in 136 Fed. (2d) 112 (R. 62).

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered June 1, 1943. Petitioners filed their motion for a writ of certiorari with the Supreme Court within the time provided by statute. The Supreme Court granted the motion for writ of certiorari under the authority conferred by Judicial Code, Section 240, as amended by the Act of February 13, 1939, 43 Statutes 938; 28 U. S. C. A.

347 (a), and by Rule 38, paragraph 5 (b) of the Rules of the Supreme Court, as revised February 13, 1939.

The federal question involved in this cause concerns The Fair Labor Standards Act of 1938, and particularly Section 7 (a) of the said Act, 52 Statutes 1060; 29 U. S. C. A. 207, which reads as follows:

> "Section 7 (a)—No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in interstate commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

STATEMENT OF THE CASE

Your petitioners originally brought this action in the United States District Court for the Northern District of Texas, Fort Worth Division. The action was brought under the provisions of the Fair Labor Standards Act of 1938, hereinafter referred to as the ACT, to recover overtime pay from the respond-

ent, Swift & Company, their employer. The District Court rendered judgment in favor of the respondent, and appeal was taken by petitioners to the United States Circuit Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court. Your petitioners filed their motion for a writ of certiorari which has been granted.

The case was tried before the District Court, without jury, and all of the facts were presented to the court by a stipulation of agreed statement of facts (R. 36 to 56). Before coming to trial all issues save two were disposed of. These two issues were, (1) What constitutes "work" within the meaning of the Act, and (2) How is "regular rate of pay" determined within the meaning of the Act on the basis of the facts presented.

The facts in the case may be briefly summarized as follows: Your petitioners, Jim Skidmore, W. W. Rousey, E. Phennell, H. Millican, R. Roark, Tom Dennis and Ted Hayes, had for a number of years prior to October 24, 1938, the effective date of the Act, been employed by the respondent, Swift & Company, in its meat packing plant in Fort Worth, Texas (R. 37). Petitioners Tom Dennis and H. Millican had been exclusively engaged in maintaining fire fighting equipment (R. 36). The other petitioners worked as elevator operators in the plant and as relief men for Dennis and Millican on their days off (R. 36). The aforementioned work, operating elevators and maintaining fire fighting equipment was performed during the day light hours between 7:00 A. M. and 3:30 P. M., each of the petitioners working five days

per week (R. 37). Each man was paid a weekly wage from $27.00 to $29.00 (R. 38).

In addition to the daytime work each petitioner was required to remain, and did remain on duty, four and later three and one-half nights per week in the fire hall at the respondent's plant to be on call in the event of fire or other casualty (R. 37). On these nights each petitioner was required to remain from 5:30 P. M. until 6 A. M. the next morning, pursuant to a schedule (R. 39, 40, 48, 49), in or within hailing distance of the fire hall, but there was no occasion to do more than remain there unless an alarm sounded (R. 37). On these nights respondent permitted petitioners to read, play dominos, listen to the radio, or sleep, so long as they remained "in or within hailing distance of the fire hall" (R. 37). In the event an alarm was answered the man answering was paid 50 cents, and later 64 cents (R. 43, 52). During the period of more than two years in question petitioners were required to answer only 29 alarms, for which they were paid at 50 cents or 64 cents each (R. 45, 53).

After October 24, 1938, the effective date of the Act, petitioners were required to continue in the fire hall at night just as they had prior to that time (R. 36). However, when one of the petitioners worked more on his daytime duties than the maximum number of hours permitted under the Act in any one week he was paid for this over-time at the rate of 68 cents per hour (R. 56). The record does not show that prior to October 24, 1940 any petitioner ever worked in excess of the maximum legal hours in a week on his daytime work (R. 39, 40, 54). The record in-

dicates that on eight occasions Dennis and Millican did work more than the maximum legal number of hours on their daytime work from one to four hours and were not paid any overtime, and except for the periods noted they were never required to work overtime during daytime work (R. 55). In the event one of the petitioners was absent from his daytime duties his weekly salary was "docked" $5.40 until January 1, 1940, and thereafter at the rate of 64 cents per hour, if the absence involved less than a full day (R. 43).

The record shows that each of the petitioners maintained a residence of his own (R. 37).

In finding for the respondent the District Court expressed the opinion that since there was no work to perform, except on the few occasions when there were fire alarms, that the time spent in the fire hall by the petitioners was not "hours worked" within the meaning of the Act (R. 27). The Circuit Court in affirming the judgment of the District Court expressed the opinion that "the Act does not require payment of wages to an employee merely because he is away from home" (R. 63).

SPECIFICATION OF ERRORS

(1). The District Court erred in its conclusion of law in finding: "The time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the

Courts," and the Circuit Court erred in upholding and affirming this opinion.

(2) The District Court erred in rendering judgment for the respondent, and the Circuit Court erred in affirming that judgment.

(3) The District Court erred in refusing to render judgment in favor of petitioners for overtime pay computed at one and one half times the regular rate of $27.00 to $29.00 for a 40 to 44 hour workweek, inasmuch as the evidence discloses that petitioners were required as part of their employment to remain in respondent's service in excess of 44 hours and later 40 hours per week, and were nevertheless paid nothing for this extra duty, except in instances where they answered an occasional fire alarm and in which cases they received 50 cents and later 64 cents for each alarm answered. The Circuit Court erred in affirming the judgment of the District Court, and in not remanding the case.

(4) The District Court erred in failing to render judgment for the petitioners for an additional amount of money equal to the amount of overtime due, as liquidated damages, and for attorney's fees as provided by the Act.[6] The Circuit Court erred in not reversing the judgment of the District Court and in failing to instruct the trial court to render judgment for liquidated damages and for attorney's fees.

SUMMARY OF ARGUMENT

In its opinion the District Court held, in effect, that unless an employee was busy doing something for

his employer he was not "working" within the meaning of the Fair Labor Standards Act of 1938, hereinafter referred to as the ACT, and that therefore he was not entitled to overtime compensation for time he might spend on his employer's premises pursuant to a contract with the employer holding himself in readiness to perform services the subject of contract. The Circuit Court upheld the District Court, and went further saying, "Nor does the Act undertake to regulate or restrict reasonable and bona fide agreements whereby an employee agrees to be available if needed." The opinions of the courts below were made without recognition of the facts that in the instant case your petitioners were required by the terms of their employment to remain on the respondent's premises, away from their own homes. Both the District Court and the Circuit Court gave expression to the belief that a person was not to be considered as "working" within the meaning of the Act since he was permitted by the indulgence of his employer to listen to the radio, sleep, play games and recreate himself, even though he was required to be present and ready at any moment to answer any call of fire or other casualty in the respondent's plant, and was not free to leave the premises. The lower courts made no reference in their opinions to the fact that the petitioners gave up their freedom of action, including the privilege of spending evenings with their families at home, for the service of the respondent.

The lower courts further failed to take account of the intent of Congress as expressed in the Act, requiring an employer to make additional payments for excessive hours of work.

Although the Act itself does not define what is meant by "work," other than to say that "employ" includes to suffer or permit to work," the Supreme Court in cases under other Federal Statues has defined the meaning of "work" or "on duty" in the cases of *M. K. & T. Ry. v. United States*, 231 U. S. 112, and in *Boautiful Brick Company v. Giles*, 276 U. S. 154. Other lower courts have given expression to the meaning of these terms within the meaning of the Fair Labor Standards Act itself: *Walling v. Allied Messenger Service*, 47 Fed. Sup. 775; *Travis v. Ray*, 41 Fed. Sup. 6; *Fleming v. Rex*, 43 Fed. Sup. 950; *Johnson v. Dierks Lumber Co.*, 130 Fed. 62d) 115. In each of these cases the respective courts held that when an employee was on his employer's premises waiting for some circumstance to occur which would require his activity in his employer's interest that the employee was in the "employ" of his employer, and entitled to pay under the terms of the Act.

It has at all times been the position of your petitioners that the wording and intent of the Act entitled them to overtime compensation at a rate of one and one half times their regular rate of pay for all the time they were required to be present, and were in fact present, at respondent's plant in excess of the maximum number of hours provided by the Act during any one workweek. It has also been consistently contended by petitioners that the record reflects that their regular rate of pay was as established by the respondent, their weekly salaries for the maximum number of hours permitted by the Act.

ARGUMENT

I

THE TIME WHICH PETITIONERS WERE REQUIRED TO STAY IN THE RESPONDENT'S FIRE HALL CONSTITUTES "WORKING TIME" WITHIN THE MEANING OF THE ACT, REGARDLESS OF THE FACT THAT PETITIONERS WERE PERMITTED TO RECREATE THEMSELVES AND SLEEP DURING THE TIME THEY WERE NOT ACTUALLY ANSWERING ALARMS.

It is clear from the record that the petitioners were required, and in fact did, stay in the respondent's fire hall on certain nights of each week during the period in question, after they had performed a full day's work in the respondent's plant. During these nights on duty nothing was required of petitioners other than to be present at the fire hall to respond to calls in the event of fire or other casualty (R. 37). They were permitted to read, listen to the radio, play games, or sleep during periods when there were no duties to perform, but during those periods they were not permitted to absent themselves from respondent's premises nor to visit their own homes (R. 37).

The respondent contended that since petitioners were not required to do anything except to be present to answer calls during the hours in excess of the maximum provided by the Act in any week, that these excess hours did not constitute "work" or "period of employ" for which overtime compensation was due under the Act.

This District Court apparently accepted this reasoning, for after discussing the privileges the petitioners had, it said, (R. 27),

> "Of course we know pursuing such pleasurable occupations or performing such personal chores,

> does not constitute work. But does the fact they were subject to calls, though rare, make such hours, so spent, work hours under the Act for which overtime compensation is due them. That is the initial question. I do not think so."

The Circuit Court affirmed the District Court, and went further, discussing the fact that petitioners agreed to remain on the premises, saying, (R. 64),

> "The Act does not require the payment of wages to an employee merely because he is away from home. Nor does the Act undertake to regulate or restrict reasonable and bona fide agreements whereby an employee agrees to be available if needed. 'Working' is not synonymous with 'availability for work'."

The purpose of Congress in adopting the Fair Labor Standards Act was not to permit an employer to evade its requirements by the subterfuge of allowing his employees to rest and relax and at the same time to require them to be at places designated by the employer to perform certain work when and if the occasion arose for the performance thereof. The "standing by" of employees at such designated places, ready, willing and able to perform such work does not delimit their status as employees.

The Circuit Court in *Murray v. Nobleseille Milling Company* (7-Cir.) 151 Federal (2d) 470 (l. c. 472) succintly stated the purpose of the Act in this language: "—the purpose of the overtime provision of No. 7 was to apply financial pressure upon the employer to reduce hours of work and spread employment."

It is clear that in the instant case the respondent was undertaking to circumvent the provisions of the

Act. Had it abided by the terms of the Act the petitioners would not have been required to remain on duty at night after having performed during daytime the maximum hours set out in the Act.

In the final analysis it is for the courts to say what constitutes "work" in each particular case, but it is evident that Congress was not attempting to delimit the term "work" or "employment" with any statutory definition, for none is present, except to say the "Employ includes to suffer or permit to work." If in deed the service performed by petitioners was work in the general broad conotation of the word then respondent has failed to observe the letter and the spirit of the law.

It is submitted that both the District Court and the Circuit Court in considering the questions presented in this case failed to consider that petitioners remained at the plant, in the fire hall nights primarily and entirely in the interest of the respondent. It is clear from the record that petitioners were required by respondent to remain in the fire hall after having completed a full day's work in the plant. That the respondent, with the ordinary indulgence of an employer interested in retaining the good will of his employees, permitted petitioners to recreate themselves, does not operate to exempt it from the requirements of the law.

It is unnecessary that an employee be physically performing work in order to be considered "working," rather it may be that during periods of complete inactivity an employee is "working" within the meaning of the Act and within the general meaning of

the term "work." Although this direct question has not been presented to this court as it arises under the Fair Labor Standards Act, other courts have in a number of cases dealt with the precise issue:

Fleming v. Rex, 43 Fed. Supp. 950, was an action instituted by the Administrator of the Wage and Hour Division of the U. S. Department of Labor to enjoin an employer from working certain employees on an oil lease for hours in excess of the maximum provided under the Act, without the payment of ove time, and there the court said:

> "For the purpose of determining overtime compensation due to oil pumpers of defendant in accordance with the Act, there should be included as hours worked by such pumpers not only the hours that such pumpers were actually engaged in manual labor, but also such hours as there were charged by the terms of the understanding between them and the defendant, with substantial responsibility for the successful operation of the pumps under their charge; and including also the periods during which they were obliged to remain on or near the premises to enable them to carry such responsibility properly. See M. K. & T. Ry. Co. v. United States, 231 U. S. 112. . . ."

A number of other cases have been considered by the lower courts in which they held that under the terms of the Fair Labor Standard's Act periods of inactivity may be considered as "hours worked" when the employee is required to be present on the job waiting for a call to activity: See *Travis v. Ray*, 41 Fed. Sup. 6; *Sunshine Mining Co. v. Carver*, 41 Fed. Sup. 560; *Sklar Oil Corp v. Thompson*; 126 Fed (2d) 872; *Walling v. Allied Messenger Service*, 47 Fed.

Sup. 775; *Walling v. Sun Publishing Co.*, 47 Fed. Sup. 180. In each of these cases the courts relied on the expression given to the meaning of "hours worked" by the Supreme Court in the case of *M. K. & T. Ry. Co. v. United States*, 231 U. S. 112, in which the Court said:

> "One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period, and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, subject to call, and not at liberty to go away. They were nonetheless on duty when inactive. Their duty was to stand and wait."

The court at present has before it the case of *Wantock v. Armour & Company*, 140 Fed. (2d) 356, which is closely analogous with the instant case as far as the facts are concerned with working hours, though the facts are different on the question of "rate of pay." In that case the trial court disallowed certain hours as hours of "work" when the employees were sleeping, and on appeal the employees did not raise the question, hence the question of sleeping time is not present. In the instant case the record is silent as relates the number of hours that the petitioners slept, except for the statement that "there was ample time for sleeping." (R. 37). In considering this question in the *Wantock Case* the Seventh Circuit Court said, "The correctness of the District Court's holding that time devoted to sleeping and eating should not be counted as part of overtime is not before us," indicating that there was some question in the Court's mind as to the propriety of such

holding. In the cases cited above, however, particularly in the case of *Fleming v. Rex*, supra, there was present the question of the hours devoted by the employee to sleeping, and the court held that so long as an employee was charged with the responsibility of the operation of the pumps that he was "working" within the meaning of the Act.

Your petitioners urge that no differentiation can be made in the instant case between hours devoted to sleeping and other hours spent by them in the fire hall for that they were on duty the full time. At no time were they leading a normal life. At no time during the hours embraced in their contracts could they leave the premises.

II

THE OPINIONS OF THE DISTRICT AND CIRCUIT COURT RENDERED IN THIS CAUSE ARE NOT SUPPORTED BY THE WEIGHT OF AUTHORITY.

A careful reading of the opinion of the Circuit Court discloses a reference to *IB 13* as the only authority cited. The District Court considered three cases in its opinion, *Cordell v. H. F. Wilcox Oil and Gas Co.* (U. S. Dist. Ct. N. D. Okla.) 5 labor cases, Sec. 60807; *Carlton v. London Mines & Milling Co.*, (Colorado District Court, Second Judicial District) 4 labor cases, 60699; and *Muldowney v. Seaburg Elevator Co., Inc.* (U. S. Dist. Ct. E. D. N. Y.) 4 labor cases, 60517. These cases were also relied on by the respondent. Your petitioners would call the Court's attention to the marked difference between the facts in those cases and the facts in the case at bar. In both the *Cordell* and the *Carlton cases* the employees lived with their families at the place of business of the employer. The facts in those cases reveal that the

employees could pursue a "normal course of living." Indeed the facts reveal in the *Cordell case* that the employee was permitted to come and go at will, frequently being absent from his place of employment for long periods of time. In the *Carlton case* the record shows that the employee built a home on the property of the employer and that he was free to work in and about his own home and premises much of the time which time he claimed should be paid for by his employer. In the *Muldowney case* the facts are clear that the employee was not *required* by his employer to remain at the plant, but rather he was permitted to, and did come and go much as he pleased. The facts in these three cases are so foreign to the facts in the instant case as to make them cases entirely unrelated. In the instant case the facts are clear that the petitioners did not live at the respondent's plant, but rather that they maintained residences elsewhere and were required by their employment to remain at the respondent's plant according to a regular schedule; that during the periods when they were required to be in the fire hall they were not allowed to come and go, but were required to be "in or within hailing distance" of the fire hall. (R. 37). A summary of the schedule of hours worked each week by the petitioners, including the hours on general fire prevention duties, on elevator duties, and periods which petitioners were required to be in the fire hall, is set out on page 16 summarized from the agreed statement of facts: (R. 39, 40, 41, 48, 49, 50).

The respondent, Swift & Company, required each of your petitioners to spend 4, later 3½, nights per week at the fire hall according to a regular schedule so

A. M.	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.	Sun.
12 to 6	Firehall	Firehall	Off	Firehall	Firehall	Firehall	Off
6 to 7	Time Off	Time Off	Off	Off	Off	Off	Off
7 to 3:30 P.M.*	Gen. F. H. or Elevator	Gen. F.H. or Elevator	Off	Gen. F.H. or Elevator	Gen. F.H. or Elevator	Gen. F.H* or Elevator	Off
Mid-day Lunch	Lunch	Lunch	Off	Lunch	Lunch	Lunch	Off
P. M.							
3:30 to 5:30	Time Off	Firehall	Off	Off	Firehall	Firehall	Off
5:30 to 12**	Firehall	Off	Firehall	Firehall	Off	Off	Firehall
Total Hours On Duty	20½	16	6½	20½	16	16	6½ — 102

*Prior Oct. 24, 1940. This period was extended to 5 P. M. on Saturday (or on one day per week for each man).

**After May 2, 1939. This was an "Off" period 4 days per week.

that there would always be some men on duty there. A schedule showing a typical work-week for one man, as summarized from the stipulated facts (see tr. p. 39, 40, 41, 48, 49, 50).

It is the contention of the respondent, Swift & Company, that only the time spent by the petitioners in performing "General Fire Hall Duties," that is maintaining fire fighting equipment, and in operating elevators was "time worked," and that the time petitioners were required to spend in the Fire Hall was not "work", nor a period of "employ" within the meaning of the Act. The respondent did not even show these hours in the Fire Hall as time for purpose of pay, as is shown by the schedule of pay. (tr. p. 46, 47, 52, 53).

It is clear and undisputed that your petitioners were "on duty" at the respondent's plant for 102 hours per week, with the variations in hours as indicated by the schedule. During these hours they were in the service of the respondent at his place of business, present and ready to perform any task assigned. They were not free to go home to their families, nor to leave the plant, but were required to stay "on the job" all of that time. It is true that during the night periods they were seldom called upon to perform any task, and that the respondent was tolerant and permitted the petitioners to listen to the radio, read and sleep, provided always that they remained "on the job." The duty performed at night can be compared to the duty performed by any municipal fireman, who remains at his station subject to call, but who has no additional duties to perform except to respond to fire alarms when sounded.

Both the District Court and the Circuit Court cited as authority for their opinions the Interpretative Bulletin No. 13 of the Administrator of the Wage and Hour Division. In the brief presented to this Court by the petitioners with their motion for writ of certiorari the pertinent paragraphs of this Bulletin were set forth, and for the sake of brevity they will not be discussed in detail here. However, it must be apparent to this Court that the lower courts applied paragraphs of the Bulletin to this case which do not conform to the facts. The lower courts relied upon the reasoning of the Administrator that where an employee lived on his employer's premises, and was simply on call, that then such on call hours might not be considered work. But the facts in the instant case are clearly contrary to the situation treated within that part of the Administrator's Bulletin. In this case the petitioners did not live at the employer's plant, but rather maintained residences of their own. (R. 37). Nor did they stay at the employer's plant in the course of "normal living," but rather they were required by their employment agreement to stay at the respondent's plant certain nights during each workweek in question. They were not "on call" in the sense that they were about their own business and subject to being called from their own homes, but rather they were required to stay away from their homes and at the respondent's plant, but they had nothing to do except when "called" by an alarm.

III

INASMUCH AS IT IS UNDISPUTED THAT PETITIONERS WERE EMPLOYED BY RESPONDENT FOR DAYLIGHT SERVICE, AND THAT THIS

SERVICE WAS EXTENDED INTO THE NIGHT BY REASON OF WHICH PETITIONERS WERE EMPLOYED FOR A WORK-WEEK BEYOND THE MAXIMUM HOURS PROVIDED BY SECTION 7 (a) OF THE ACT, PETITIONERS ARE ENTITLED TO OVERTIME PAY CALCULATED AT ONE AND ONE-HALF TIMES THE REGULAR RATE OF PAY WHICH THEY RECEIVED FOR THE FORTY-FOUR AND LATER FORTY HOURS DAYLIGHT WORK.

Neither the District Court nor the Circuit Court gave any consideration to the question of the means of computing the "regular rate of pay" under the facts in this case, leaving that portion of the case undecided since by finding in favor of the respondent it became unnecessary to consider the rate of pay. The District Court in its opinion said, "This holding eliminates the necessity of passing on a number of other questions some of them novel and interesting, among them, how the regular rate of pay of these men would have been arrived at, if I had allowed such call time as overtime."

Congress did not attempt to define the term "regular rate of pay" in the Act, but simply said in Section 7 (a) that overtime should be paid "at a rate not less than one and one half times the regular rate at which he is employed." However, this Court has had occasion to treat with the question of "regular rate of pay" as it arises under the Act in two instances:

Walling v. Belo Corp., 86 Law Ed. 1166 (U. S. S. C. July 8, 1942) and in *Overnight Motor Transporta-*

tion Co v. Missel, 86 Law Ed. 1159 (U. S. S. C. July 8, 1942). However, in neither of these cases was the method of payment similar to the case at bar. In the *Belo case* there existed a written contract between the employer and employees which provided for a regular rate of pay for a certain number of hours, which the employer paid regularly even though the employee did not spend the required number of hours on the job. In the *Missel case* employees were paid a regular weekly salary which never varied with the number of hours worked. In the instant case the employees were paid a weekly salary, but in the event they worked on their daylight jobs in excess of the maximum hours provided by [redacted] Act they were paid for the excess hours of daylight work at time and one half the regular rate of pay based upon their salary ($27.00 to $29.00) divided by the maximum number of hours provided for by the Act, (R. 47), or 68 cents per hour, (R. 56), and for holiday-daytime work they were paid double time for those hours. (R. 47). And in the event of absence from a day's daylight work, petitioners were "docked" at the rate of $5.40 ($27.00 ÷ 5) until January 1, 1940, and thereafter 64 cents per hour, if the absence involved less than a full day (R. 43). The record is silent on the question of what occured in the event of absence from night duty, but it is contended by petitioners that since all of the evidence indicates that the salary of $27.00 to $29.00 was treated as pay for their daylight duties, and since the respondent has consistently taken the position that petitioners were not "working at night" and the further contention of the respondent that petitioners were paid a legal wage for all

their daylight work—then the conclusion must be that petitioners were paid nothing for their nights; and if the Court finds that the time spent in the fire hall was "work" within the meaning of the Act the petitioners are entitled under the Act to receive one and one-half times their regular rate of pay for all hours worked each week in excess of the hours spent in the daylight service. To summarize: Since petitioners have worked 102 hours, with some variations, and have been paid for only 40 to 44 hours, they are entitled to overtime pay for the 58 to 62 hours (the exact number of hours to be determined by the exact difference in hours worked each week by each petitioner), and the regular rate of pay is the hourly rate arrived at by dividing the weekly salary by the hours worked on daytime jobs each week during the period of employment of each petitioner, as established by the facts presented in the record. The schedule of pay as set forth in the stipulation of facts reveals that for the 40 to 44 hours worked in the elevators or on general fire hall duties the petitioners were paid $27.00 to $29.00 per week (T. 46, 47, 54, 55.) The record further indicates that for any fire or emergency calls answered at night the petitioners were paid 50 cents and later 64 cents for each alarm answered. The record is silent on any other payment of wages. Your petitioners take the position that they were never paid anything for their services in staying at the fire hall at night, except the amounts they received when they answered an alarm, which was very rare, being only 29 times for all seven petitioners in more than two years. Indeed in its original answer the respondent said "Defendant denies that

plaintiff was employed during any workweek involved herein for a number of hours greater than the number of hours spent acting as an elevator operator, and in answering fire alarms, and defendant says that it has heretofore paid plaintiff for all of such work at a lawful rate. * * *"

The petitioners' position that they have been compensated for only their 40 to 44 hours daylight work, and for the hours they spent in answering alarms is supported by the following findings of the trial court:

> "(2) Plaintiffs have been compensated at a lawful rate for all of their work in general fire hall duties, such as keeping in proper condition the plant fire-fighting equipment such as hose, sprinkler system, extinguishers and barrels, and as elevator operators and relief men."

Although, as has been pointed out, the facts in the *Bolo* and *Missel cases* (supra) are not analogous to the case at bar the Eighth Circuit Court has considered an almost identical case in facts presented, in *Sklar Oil Corp. v. Thompson*, 126 Fed. (2d) 872. In that case it was shown that the employee was paid a regular salary for a specified number of hours, but that the employee worked additional hours for which he received no pay. In treating with the employer's contention that the salary should be extended to include all hours worked in order to determine what the regular hourly rate was the Court said:

> "An employer cannot thus flee to the courts for protection to reduce the liability he may have incurred by refusing to recognize certain hours spent by his employees in service as work. . . . Its (Appellant, Sklar Oil Corporation) only con-

> tention in this regard is that the flat salary employment precludes computation at an hourly rate. This contention, of course, falls away in the presence of appellant's own records."

Though the facts in the instant case are not analogous to the facts as they relate to the matter of "rate of pay" in the case of *Mumpus v. Continental Baking Co.*, 124 Fed. (2d) 548, the expression given by the Sixth Circuit Court in discussing the determination of "regular rate of pay" said:

> "To lessen the regular rate of pay in interpretation, where in fact it was a rate established, would defeat this section (Section 7) of the Act."

Indeed that is precisely what the respondent seeks to do in its answer, and in the brief which it filed in the Circuit Court. It contends first that there was no overtime work and that the petitioners have been paid the lawful wage for all of their work, then in the alternative says that in the event the courts should determine that the petitioners did work overtime, the wages paid should be construed to be payment for all hours worked. Such a contention fails in the face of the employment practice of paying 68 cents per hour for work in excess of the maximum for daylight work in any one workweek. Though there was no written contract establishing a set hourly rate of pay, as there was in the *Walling v. Belo case*, supra, there was an established practice which was as effective as is a written contract. The regular rate in this case was $27.00 to $29.00 per week for the maximum number of hours permitted under the terms of the Act. Overtime payment is due at time and one-half this rate of pay.

The respondent in its argument in the Circuit Court emphasized the large sum of money which the petitioners seek to recover by virtue of their overtime work. However, the amount itself would not be so great, if the petitioners were not entitled to receive in addition to the overtime pay due them, an equal amount as liquidated damages and a reasonable amount as attorney fees. It is well settled that, in the event of any recovery, petitioners are entitled to these additional amounts. See *Overnight Motor Transportation Company v. Missel*, supra.

SUMMARY AND CONCLUSION

Since the Act itself does not define the term "work," and says only that "employ means to suffer or permit to work," we may look to the general meaning of those terms in the English Language in an endeavor to assay what Congress intended when it said, "No employer shall employ * * *." It has been pointed out that one of the purposes of the Act was to reduce unemployment by making it more economical for employers to work their employees shorter hours, than to pay time and one-half for overtime and thus to make it economical to engage new employees rather than work old employees long hours. That being the purpose, it would appear that Congress had in mind just such situations as the one presented by the case at bar, for here definitely was a situation which, had the respondent recognized the duty performed by the petitioners as "work" or as being within the term "employ," it would have resulted in a more economical operation to hire new employees rather than to keep your petitioners some 60 hours overtime each week.

Your petitioners have shown that the weight of authority supports their position to the effect that the hours spent at night in the respondent's fire hall were hours within the meaning of the term "employ" as used in the Act. The facts in the case are such that only one logical conclusion can be reached for the computation of "regular rate of pay"; i. e., the weekly salary of $27.00 or $29.00 divided by the maximum number of hours provided by the Act for each particular year.

Authority has been cited showing that your petitioners were entitled to an additional amount equal to the amount of their overtime as liquidated damages, and are entitled to a reasonable attorney's fee.

For the reasons stated, we respectfully submit that the judgment of the Circuit Court of Appeals should be reversed, and that the Court be instructed to find for the petitioners.

Respectfully submitted,

CURTIS McBROOM,
MARK McGEE,
1404 Commercial Standard Bldg.
Fort Worth Texas.

Attorneys for Petitioners,
JIM SKIDMORE, ET AL.

Of Counsel
NORTON I. KATZ,
31 Nassau Street,
New York, N. Y.
TOMMY FORBIS,
JACK LOVE.
Burk Burnett Bldg.,
Fort Worth, Texas.

Mark McGee